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REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

Minimum humanitarian standards

Report of the Secretary-General

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Introduction

1. The present report contains additional information received from Governments after the submission for processing and reproduction of the report of the Secretary-General on the subject (E/CN.4/1997/77).

2. As at 24 January 1997, comments had been received from the Governments of Ecuador, Switzerland and Yugoslavia. The Permanent Missions of Denmark, Finland, Iceland, Norway, South Africa and Sweden to the United Nations Office at Geneva sent the report of the International Workshop on Minimum Humanitarian Standards (Cape Town, South Africa, 27-29 September 1996), requesting that it be circulated as a document of the fifty-third session of the Commission on Human Rights.

3. Consequently, the present document contains the comments of the above-mentioned Governments and the report of the workshop referred to above.

I. COMMENTS RECEIVED FROM STATES

Ecuador

[Original: Spanish]
[17 January 1997]

The Government of Ecuador acknowledges the resolution of the United Nations Commission on Human Rights of 19 April 1996 and assures the Commission of its commitment to implementing the terms of paragraph 3 of the document "Minimum humanitarian standards".

Switzerland

[Original: French]
[27 December 1996]

1. Internationally, the Swiss Government attaches great importance to the "Minimum humanitarian standards", which it has suggested calling "minimum standards of humanity" for the reasons given in its comments addressed on 8 December 1995 to the United Nations Secretary-General (see E/CN.4/1996/80/Add.1 of 4 January 1996).

2. The participating States of the OSCE (Organization for Security and Cooperation in Europe) are also concerned by this matter. For instance, in the Budapest Summit Declaration, in December 1994, the 54 member States of OSCE emphasized the significance of a declaration on minimum humanitarian standards applicable in all situations and declared their willingness to actively participate in its preparation in the framework of the United Nations.

3. With this end in view, Switzerland, as the State presiding over OSCE in 1996, convened an informal open-ended ad hoc OSCE meeting on minimum standards of humanity in Vienna on 13 and 14 February 1996. The aim of the meeting was not to coordinate the positions of OSCE member States, but to provide an opportunity to discuss issues related to minimum standards of

humanity. That substantial, constructive exchange of views did indeed provide the OSCE member States, intergovernmental organizations, the International Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs), as well as several invited experts, with an awareness of the question. The discussions begun in Vienna concentrated on two main themes, firstly, on the need to prepare a declaration on minimum standards of humanity, on relations between such standards and international law, and on relations between international humanitarian law and the international law of human rights in the framework of such a declaration; and secondly on the content and recipients of the declaration.

4. Following resolution 1996/26 adopted on 19 April 1996 by the United Nations Commission on Human Rights, which was jointly sponsored by Switzerland, a workshop, organized by the Nordic countries and by South Africa in cooperation with the ICRC, was held in Cape Town last September. The purpose of the workshop was once again to make the international community more aware of the very serious violations of human rights and humanitarian law which are committed by Government authorities, armed groups or individuals in situations of internal disturbances, crises and tensions, including latent or low-intensity conflicts. In view of such violations, there is an urgent need to promote the universal adoption of a political declaration concerning minimum standards of humanity applicable in all circumstances and at all times.

5. Following the Cape Town workshop, Switzerland hopes that the United Nations Commission on Human Rights will mandate the Centre for Human Rights in Geneva to undertake an analytical study, jointly with the ICRC, of all matters relating to minimum standards of humanity. This study would be based on the contributions of the ICRC, governments, bodies in charge of supervising the application of human rights conventions, universal and regional organizations, as well as NGOs. Switzerland also hopes that the study may subsequently be discussed on the occasion of an open seminar, under the aegis of the Commission on Human Rights.

6. Swiss legislation relevant to situations of public emergency or crises meets the requirements of the rule of law and does not involve discrimination on the grounds of race, colour, sex, language, religion or social origin.

7. Under article 89 bis of the 1874 Federal Constitution, generally binding federal decrees whose entry into force ought not to be delayed may be put into effect immediately by a decision taken by the two chambers of the Federal Assembly. Their period of validity is limited. Federal decrees which have no constitutional basis must be approved by the people and the Cantons within one year after their adoption by the Federal Assembly; failing this, they lose their validity after the lapse of this year and may not be renewed.

8. In its article 102, moreover, the Federal Constitution contains provisions applicable to emergency or crisis situations (paras. 9 and 10). The Federal Council may act to prevent any serious direct threat to the legal exercise of public authority, or to the life, health and property of the citizens, for instance, in the event that the country's security or independence are seriously threatened from abroad. In principle, however, these powers may not depart from the Constitution or existing legislation.

9. Mention should also be made of the law of necessity. This comes into effect whenever the very existence of the State is threatened and when constitutional procedures are no longer sufficient to deal with the danger. In such situations, it is admitted that the competent authorities are vested with the power to take whatever measures are necessary to safeguard the existence and independence of the country. This power rests in the first instance with the Federal Assembly. If the Federal Assembly brings the law of necessity into effect, popular rights (by referendum) are suspended. The Parliament may also delegate its power to the Federal Council. This delegation of powers has occurred twice in the history of the country, during the two World Wars of 1914/18 and 1939/45. It has never occurred since. The power to bring the law of necessity into effect is vested in the Federal Council whenever Parliament is no longer legitimately able to take decisions and is therefore unable to use either its power of decision or its power of delegation with respect to the law of necessity. Such a case has so far never arisen.

10. The law of necessity, as referred to above, is governed by the following guiding principles:

(a) It is brought into effect only in the event of a real state of necessity, which may be expressed legally in terms of the principle of proportionality. According to this, any measures not absolutely required by the state of necessity have to be adopted following the normal constitutional procedure;

(b) The exercise of powers arising from the law of necessity must be subject to the political supervision of the Federal Assembly, which must be able to decide regularly whether the Federal Council's decisions are to be maintained. Such was the case in any event at the time of the two world wars. Such supervision may be waived only in the case where not even part of the Parliament may be convened for the purpose.

11. For more information, the initial report of Switzerland submitted in accordance with the International Covenant on Civil and Political Rights may be consulted (CCPR/C/81/Add.8, of 26 May 1995).

Yugoslavia

[Original: English]
[27 December 1996]

1. The Constitution of the the Federal Republic of Yugoslavia (Official Gazette, No. 1/1992), article 78, paragraph 1, item 3, reads as follows:

> "The Federal Assembly shall: decide on alterations to the frontiers of the Federal Republic of Yugoslavia; decide on war and peace; declare a state of war, a state of imminent threat of war, and state of emergency."

2. Article 85, paragraphs 1 and 2 of the Constitution:

"The Federal Assembly may not be dissolved in the first or last six months of its term, during a state of war, imminent threat of war, or state of emergency.

"In the event of a state of war, imminent threat of war, or state of emergency, the Federal Assembly may decide to prolong the terms of the federal deputies, so long as such a state of emergency lasts, or until conditions are created for the election of federal deputies."

3. Article 99, paragraph 1, items 10 and 11 of the Constitution:

"The Federal Government shall, when the Federal Assembly is not able to convene, proclaim an imminent threat of war, state of war, or emergency.

"The Federal Government shall, when the Federal Assembly is not able to meet during a state of war, imminent threat of war, or state of emergency, after having sought the opinion of the presidents of the Federal Assembly chambers, adopt measures regulating matters within the jurisdiction of the Federal Assembly."

4. The Constitution of the Republic of Serbia:

"Article 72

"The Following shall be regulated and provided by the Republic of Serbia:

"...

"3) defense and security of the Republic of Serbia and of its citizens; measures to cope with emergencies;"

"Article 79

"The National Assembly shall convene without being called in case of declaring a state of emergency in any part of the territory of the Republic of Serbia."

"Article 83

"The President of the Republic shall:

"...

"8) at the proposal of the Government, if the security of the Republic of Serbia, the freedoms and rights of man and citizen or the work of State bodies and agencies are threatened in a part of the territory of the Republic of Serbia, proclaim the state of emergency, and issue acts for taking measures required by such circumstances, in accordance with the Constitution and law;"

"Article 89

"The National Assembly may not be dissolved during a state of war, an immediate threat of war or a state of emergency."

5. The Constitution of the Republic of Montenegro:

"Article 48

"RESTRICTION OF OWNERSHIP AND EARNING

"The right to own property and the freedom of earning may be restricted by law, i.e. legal regulations with the force of law, for the duration of a state of emergency, in times of immediate threat of war or a state of war."

"Article 84

"DISSOLUTION OF THE ASSEMBLY

"The Assembly may not be dissolved during the state of war, in case of an imminent danger of war or a state of emergency."

"Article 94

"COMPETENCIES

"The Government shall:

"...

"7) enact decrees and enactments during a state of emergency, in the event of imminent war danger or in the event of a state of war, if the Assembly shall not be able to convene, and shall submit to the Assembly the said enactments for its approval as soon as the Assembly shall be in session;

"8) perform all other tasks as prescribed by the Constitution and law".

II. INTERNATIONAL WORKSHOP ON MINIMUM HUMANITARIAN STANDARDS

1. The Permanent Missions of Denmark, Finland, Iceland, Norway, South Africa and Sweden to the United Nations Office at Geneva sent, on 16 January 1997 to the Centre for Human Rights, a letter which reads as follows:

"In its resolution 1996/26 entitled 'Minimum humanitarian standards', adopted on 19 April 1996, the Commission on Human Rights welcomed the offer by the five Nordic countries to organize, in cooperation with the International Committee of the Red Cross, a workshop to which governmental and non-governmental experts from all regions would be invited to consider issues related to minimum

humanitarian standards and to make the outcome of the workshop available for dissemination to Governments and intergovernmental and non-governmental organizations.

"At the invitation of South Africa, the workshop was convened in Cape Town on 27-29 September 1996 in order to address minimum humanitarian standards applicable in all situations.

"We would therefore be grateful if you could arrange for the attached report of the workshop to be circulated as a document of the Commission on Human Rights, under item 16 of the provisional agenda at its fifty-third session."

2. In compliance with that request, the report of the workshop is reproduced at annex.

ANNEX

Report of the International Workshop on Minimum Humanitarian Standards

(Cape Town, South Africa, 27-29 September 1996)

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I. INTRODUCTION

A. Background and basic facts

1. In its resolution 1996/26 entitled "Minimum humanitarian standards", adopted on 19 April 1996, the Commission on Human Rights recognized the need to address principles applicable to situations of internal violence and disturbance of all kinds in a manner consistent with international law; acknowledged the vital importance of appropriate national legislation for dealing with such situations in ways consistent with the rule of law; and invited States to consider reviewing their national legislation relevant to situations of public emergency with a view to ensuring that it did not involve discrimination on the grounds of race, colour, sex, language, religion or social origin.

2. The Commission also welcomed the offer by the five Nordic countries, Denmark, Iceland, Finland, Norway and Sweden, to organize, in cooperation with the International Committee of the Red Cross (ICRC), a workshop to which governmental and non-governmental experts from all regions would be invited, to consider issues related to minimum humanitarian standards. The sponsors had stressed the importance they attached to ensuring that all opinions - as diverse as they might be - would be represented at the workshop.

3. At the invitation of the Government of South Africa, the Workshop was convened in Cape Town on 27-29 September 1996 in order to address minimum humanitarian standards applicable in all situations. The Workshop was formally opened by Dr. A.M. Omar, MP, South African Minister of Justice. The co-Chairpersons of the Workshop were Justice Richard J. Goldstone (South Africa) and Professor M.R K. Rwelamira (South Africa). The Rapporteur was Ambassador Nils Eliasson (Sweden) and the Coordinator was Ambassador Per Haugestad (Norway).

4. The Workshop discussed in conceptual terms the issue of minimum humanitarian standards applicable in all situations and was not based on the drafting of the so-called Turku Declaration, although several speakers referred to that text in their interventions (see chap. C, Documentation and reference material, below).

5. On the proposal of the Rapporteur, the general debate focused, in sequence, on seven specific issues or questions which had come up during the prepared statements. The formulation of these seven issues, as they were gradually amended or expanded during the discussion, are as follows:

Issues for discussion in the general debate

Issue 1. What are the characteristics of the situations, i.e. contemporary conflicts, to be discussed?

Issue 2. Who are the actors (Governments, non-governmental armed groups, United Nations machinery including United Nations-appointed experts, the ICRC, the Office of the United Nations High Commissioner

for Refugees (UNHCR) and other international humanitarian organizations, parties to the Geneva Conventions, the Red Cross Conferences, neighbouring countries, regional organizations, ad hoc tribunals, etc.)?

Issue 3. Are there lacunae or deficiencies in the legal regimes of protection?

Issue 4. Is there a need for a common reference base and yardstick, applicable in all situations, against which situations should be assessed?

Issue 5. What would be the implications of a new basic document setting out or reaffirming or developing standards/safeguards/codes of conduct for the actors, considering that some of these standards/safeguards/codes of conduct would already be customary international law?

Issue 6. How can the risk of setting standards that fall short of existing obligations be avoided, thus ensuring the consistency of new standards with existing ones?

Issue 7. What conclusions for the future of this issue should be drawn from the present Workshop?

B. Participants and special guest speaker

6. Representatives of the following States attended the Workshop, to which participants from all regions of the world had been invited: Angola, Azerbaijan, Botswana, Brazil, Cameroon, Cuba, China, Denmark, Egypt, Ethiopia, Finland, France, Gabon, Germany, Iceland, Ireland, Mexico, Mozambique, Namibia, Norway, Pakistan, Poland, Russian Federation, South Africa, Sweden, Switzerland, Uganda, United States of America, Zimbabwe.

7. The following United Nations entities, international organizations and intergovernmental and other organizations were represented: Department of Humanitarian Affairs of the United Nations Secretariat, European Commission, International Committee of the Red Cross, Organization for Security and Cooperation in Europe, Organization of African Unity, Representative of the United Nations Secretary-General on internally displaced persons, United Nations High Commissioner for Human Rights, United Nations High Commissioner for Refugees.

8. The following non-governmental organizations were represented: Amnesty International, Friends World Committee for Consultation (Quakers), Human Rights Watch, International Commission of Jurists.

9. The following five Nordic human rights institutes were represented: Danish Centre for Human Rights, Copenhagen (Denmark); Human Rights Institute of Åbo Akademi University, Turku (Finland); Icelandic Human Rights Centre, Reykjavik (Iceland); Norwegian Institute of Human Rights at the University of Oslo (Norway); Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University (Sweden).

10. A special guest speaker, Justice A. Chaskalson, President of the South African Constitutional Court, addressed the Workshop. He discussed the role of the Constitutional Court in the transformation of South African society, including its examination of a legal challenge to the constitutionality of the Truth and Reconciliation Commission.

11. With regard to the subject of the Workshop, minimum humanitarian standards or standards of humanity applicable in all situations, the speaker also referred to the concept of ubuntu, a South African value system characterized by humanity and humaneness.

C. Documentation and reference material

12. The Workshop had before it numerous reference documents, inter alia, the following:

Issue Paper for the Cape Town Workshop on Minimum Humanitarian Standards, based on papers prepared by Asbjørn Eide, Göran Melander and Theodor Meron with additional input from Gudmundur Alfredsson and Allan Rosas

Paper for the Workshop on Minimum Humanitarian Standards by Rachel Brett, Friends World Committee for Consultation (Quakers), Geneva

Declaration of Minimum Humanitarian Standards. Working paper submitted by Theo van Boven and Asbjørn Eide (United Nations document E/CN.4/Sub.2/1991/55 dated 12 August 1991)

Revised version of the Turku Declaration on Minimum Humanitarian Standards (United Nations document E/CN.4/1995/116 dated 31 January 1995)

Compilation and analysis of legal norms concerning internally displaced persons, submitted by Francis M. Deng, Representative of the Secretary-General (United Nations document E/CN.4/1996/52/Add.2 dated 5 December 1995)

Draft Master's thesis by Eva Tojzner, Lund University, entitled 'Minimum humanitarian standards - An attempt to restrain internal strife"

Updated eighth annual report on human rights and states of emergency by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (United Nations document E/CN.4/Sub.2/1995/20 and Corr.1).

13. The texts of the so-called "Martens clause" and article 3 common to the Geneva Conventions of 12 August 1949, both of which were repeatedly referred to during the Workshop, are reproduced in appendix 2.

II. PREPARED AND OTHER SCHEDULED ADDRESSES AND STATEMENTS

14. At the opening ceremony and the subsequent substantive session, the Workshop heard prepared and other scheduled addresses and statements.

15. Co-Chairman Justice Goldstone recalled that, despite all the treaties and standards that had already been adopted, serious difficulties continued to arise in the following circumstances:

(a) Where the violence and strife had not reached the threshold of applicability required by international humanitarian law treaties;

(b) Where the State in question was not a party to the relevant treaties or instruments;

(c) Where derogation from the standards established under international human rights treaties and national laws had been invoked; and

(d) Where, as happened often and increasingly, the actor was not a Government, but another group which considered itself immune from obligations of humanity.

16. The task of the Workshop was not to draft any text but to consider conceptually how to improve the situation of victims without eroding existing commitments. In that context he noted his distress, as the Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, with the endless attention devoted to the formal, legal characterization of conflicts - international, internal, armed, not armed and so on. It would be a real humanitarian advance if a fresh approach could help us move on faster from sterile disputes about characterization of conflicts to the protection of victims.

17. Dr. A.M. Omar, MP, South African Minister of Justice, who formally opened the Workshop, emphasized the widespread interest in South Africa for human rights and humanitarian law. He underlined the importance of the Workshop at a time when many countries in the world were experiencing some of the most brutal and traumatizing internal conflicts. The last two decades had seen many significant changes in the scale, scope and complexity of both international and internal armed conflicts.

18. While in recent years the frequency of inter-State wars had been decreasing, the number of intra-State wars, particularly in the developing countries, had been increasing. Millions of people had been forced to abandon their homes as a result of political terror, ethnic cleansing, armed conflict and social violence. These events emphasized the need for the international community to tackle internal conflicts more seriously. States could no longer continue to hide behind the mantle of sovereignty and argue that these were matters essentially within domestic jurisdiction and therefore outside the ambit of international law.

19. The Minister pointed out that Protocol II Additional to the Geneva Conventions did not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature. Those situations represented a "twilight zone" in which some of the most gruesome atrocities had been committed and which were likely to go unpunished. The question to be considered was: What is the nature and scope of protection accorded by international humanitarian law and international law generally for victims of internal disturbances and tension?

20. He suggested for consideration two possible approaches. Firstly, Common article 3 to the Geneva Conventions and Additional Protocol II could well provide a basis on which a flexible and comprehensive framework of regulation could start to emerge. A second approach would be to look at the general law of human rights. It was in this twilight zone that international humanitarian law and the general law on human rights could complement each other.

21. In conclusion, the Minister emphasized that, while we must continue to seek minimum standards of conduct for and treatment of internal disturbances, we must not lose sight of the necessity to establish long-term solutions. Any strategy must intend to avert or limit mass population displacement and also seek to reduce the scale of violence committed by warring parties and to safeguard civilian populations from the effects of the conflict. This should be coupled with a sustained effort to address the root causes.

22. Dr. N. Barney Pityana, Chairman of the South African Human Rights Commission, referred to the development in South Africa and explained how the perspective of minimum humanitarian standards would be relevant for South Africa today. Additional Protocol II only covered a conflict once it had reached the intensity of "armed conflict".

23. As regards states of emergency, the speaker recalled that the Council of Europe had clearly spelt out the conditions under which States could declare a state of emergency:

(a) The emergency should be clearly defined and delimited by the constitution; that is, the existence of a real and imminent danger should be clearly spelt out;

(b) De facto states of emergency should be avoided and emergency rule should be specifically declared; there was a corresponding duty of notification wherein other States parties should be notified of any recourse to such measures;

(c) The constitution should clearly specify which rights could be suspended and which ones did not permit derogation and should be respected in all circumstances;

(d) The emergency measures and derogations from fundamental rights and liberties should be proportionate to the danger; and

(e) Even in a state of emergency, the fundamental principle of the rule of law should prevail.

24. The speaker noted the South African Constitution's limits on the imposition of states of emergency and its table of non-derogable rights. He recalled that the Constitutional Court had ruled the death penalty to be unconstitutional.

25. Dr. Asbjørn Eide, Director of the Norwegian Institute of Human Rights, examined the nature of contemporary conflicts, noting that in 1995 a total of 30 wars were waged at 25 locations around the world, all of them internal, and the pattern was continuing. Prior to their escalation into an open armed

conflict, there were internal tensions, unrest and disturbances of various kinds, sometimes leading to the collapse of civil order and institutions and also affecting courts and the administration of justice.

26. Many different actors were involved in these processes of tension and unrest which unfortunately all too often escalated into open armed conflicts. He noted that humanitarian law initially had been developed in response to "ordinary" international armed conflicts wherein organized regular armies faced each other, and the content of humanitarian law clearly reflected its origin. The disturbances, tensions and low-intensity conflicts which sometimes erupted into massive violence had an entirely different character, due partly to the asymmetry between the parties and partly to the lack of discipline and coherence within some of the parties.

27. While ideally Governments should maintain law and order and thereby ensure compliance by all inhabitants with domestic laws aimed at the protection against murder, rape, arson, assault and other brutalities, the problem was that under conditions of severe internal unrest the rule of law broke down or was manipulated in ways which undermined its legitimacy. Human rights law was also insufficient under such circumstances, for reasons which Dr. Eide reviewed in his presentation.

28. For these and other reasons, there was a need to clarify and recognize minimum humanitarian standards of global validity. The traditional distinctions between international humanitarian law and human rights law must not become a barrier preventing the recognition of such standards and their applicability to all parties involved in conflict.

29. The speaker reviewed the lacunae in conventional law and noted that there was a twilight zone between peace and war which was not fully covered in a satisfactory way either by human rights law or by international humanitarian law. Summing up, he observed that there were many existing treaties and identifiable standards, but significant problems remained in four areas:

(a) Where the threshold of applicability of international humanitarian law was not reached or disputed;

(b) Where the State in question was not a party to the relevant treaty or instrument;

(c) Where derogation from the specified standard was invoked; and

(d) Where the actor was not a Government, but some other group.

30. He reviewed some of the doubts that had been expressed and concluded that through a proper drafting of a declaration the difficulties could be averted. He emphasized the need for clear rules applicable in all situations to all actors and concluded that the benefits of respecting such rules should be self-evident to all responsible actors.

31. Dr Yves Sandoz, Director of International Law and Policy, International Committee of the Red Cross, noted that the starting point of the Workshop was the recognition that protection afforded to the victims of internal violence

covered by international humanitarian law was inadequate; the Workshop was an attempt to escape from the endless debate on the applicability of international law and of human rights instruments in clarifying rules applicable in all situations.

32. The work towards establishing minimum humanitarian standards had to meet four major challenges:

(a) It must be a truly unifying force and therefore broadly accepted;

(b) Further thought must be given to the scope of those standards which could either apply in all situations of violence or be limited to those not covered by international humanitarian law;

(c) It must not be the hostage of political negotiation with the risk of becoming devoid of all substance;

(d) States should not use it as a substitute for their more detailed treaty obligations.

33. The four challenges were difficult to meet and could prove to be in contradiction with each other. It was therefore wise to take a step-by-step and sectoral approach in examining in depth the real problems and questions of the different actors faced with concrete situations. Such an approach could consolidate the different aspects of the problem and diminish the fear of some Governments.

34. The ICRC could contribute to some aspects, for example through the dialogue it had started with armed forces to better define their possible role in internal violence not covered by international humanitarian law and through the study it would undertake on the identification of the norms of international humanitarian law which were recognized as part of international customary law.

35. The speaker concluded by recalling that the interest of the people whose fate was at stake had always to be kept in mind in the work ahead.

36. Mr. Zdzislav Kedzia, the representative of the United Nations High Commissioner for Human Rights, in a message from the High Commissioner, underlined that the international community could not escape from its responsibility of reacting adequately to gross violations of human rights and humanitarian crises. The end of the cold war and the debate on the Secretary-General's "Agenda for Peace" had led to the recognition that economic disparities and underdevelopment, together with the lack of respect for human dignity and violations of human rights, alienation and discrimination lay at the source of conflicts. The post-cold war era had created new opportunities but also new threats. In many cases, long-simmering problems, including ethnic ones, had erupted into bitter hostility and even civil wars.

37. These new challenges, including to the United Nations, must go beyond military interventions. The human rights programme of the United Nations had a great potential in this regard. The High Commissioner hoped that this

potential would grow in response to the evolving needs. During his first years in office, he had given priority to establishing, in several instances, a human rights field presence in order to prevent human right violations from occurring or continuing. He had also developed other means, including through dialogue with Governments and country visits.

38. The idea of minimum humanitarian standards, formally born in Turku, Finland, presented, in his opinion, an attempt to integrate existing human rights and humanitarian norms into one set of principles relevant to situations of internal violence. This was an attempt, at the same time, to improve the protection of people affected by such situations; to bridge the gap between international humanitarian law and human rights; and to raise questions related to the methodology of the protection of individuals and the reponsibility for the violations of the protection to which individuals were entitled.

39. Whatever could be said theoretically about the relationship between human rights and international humanitarian law, the decisive factor in drafting international instruments had to be the effectiveness of the protection in the field. Such a relationship also implied the need to look more closely at ways and means to coordinate more effectively the work of bodies and organizations whose mandates encompassed the objectives of the two sources of law.

40. Like all new legislative proposals, the idea of minimum humanitarian standards could be responded to with the argument - and the widely shared opinion - that, after a period of standard-setting, the international community should focus on implementation. The World Conference on Human Rights attached great importance to this subject, including by setting the goal of universal ratification of the basic human rights treaties. So, although nobody denied that, if necessary, new standards should be elaborated, the preference for implementation prevailed.

41. In its resolution 41/120 entitled "Setting international standards in the field of human rights", the General Assembly had provided an important guideline for the development of new legislative proposals. Maintaining the high level of existing human rights standards should be the preoccupation of the international community. Situations should be avoided which could allow an opportunity to misinterpret or lower existing human rights standards or obligations deriving from them. The High Commissioner proposed that a meeting of the treaty monitoring bodies could be advisable to analyse the proposal of minimum humanitarian standards in the light of their experience.

42. Dr. Francis Deng, Representative of the Secretary-General on internally displaced persons, emphasized that while the focus and scope of the proposed Declaration on Minimum Humanitarian Standards and the work of his mandate on developing a framework for protecting and assisting the internally displaced were different, he saw them as closely related, overlapping and inherently interdependent. He explained that the mandate on the internally displaced had been created with several objectives in mind: to evaluate existing standards in international law with a view to determining the extent to which they provided protection and assistance to internally displaced persons; to conduct a similar evaluation of existing international institutional arrangements

relevant to the internally displaced; to undertake country missions and enter into dialogue with Governments on behalf of the internally displaced; and to make recommendations for improved international protection and assistance for them.

43. With respect to the law, Dr. Deng explained that while controversy persisted on the extent to which existing standards provided adequate coverage, restating the law with reforms, as needed, would have the effect of bringing into focus and consolidating standards that were otherwise dispersed and diffused into a multiplicity of instruments; the result could also have an educational value, and the overall effect would be improved protection and assistance for the internally displaced. It was with that objective in mind that he, with the help of legal experts from leading universities, research institutions, relevant organizations and specialized agencies within the United Nations system and in the international community, had embarked on preparing the Compilation and Analysis of Legal Norms, which was submitted to the Commission on Human Rights at its fifty-second session.

44. The compilation and analysis demonstrated that while existing provisions provided a basis for substantial protection and assistance to the internally displaced, there were significant grey areas and gaps which needed to be remedied. Both the General Assembly and the Commission on Human Rights had requested the Representative to work on developing a "framework" for improved protection and assistance for the internally displaced. Accordingly, in collaboration with legal experts, the Representative had embarked on the development of "guiding principles" which basically restated existing standards, but also aimed at clarifying grey areas and filling the gaps in protection.

45. In that regard, the Representative reiterated that he saw the initiative on minimum humanitarian standards as complementing and mutually reinforcing his efforts on behalf of the internally displaced, the only difference being that while one was general and ostensibly comprehensive, applying to all persons in all situations, the other was specifically focused on one section of the community: the internally displaced. Both projects stood to benefit from close coordination and cooperation.

46. Mr. Adama Dieng, Secretary-General of the International Commission of Jurists, called for the early establishment of an International Criminal Court. The elaboration of minimum humanitarian standards should not overshadow the speedy establishment of such a court. Nor should it overshadow the importance of addressing the root causes of violent conflicts, which were causing tremendous human suffering. In Africa alone over 10 civil wars were taking place at the present time.

47. Mr. Dieng questioned whether the concept of "minimum" in the development of a body of humanitarian standards applicable in all situations would not be misleading. It might be used by a Government to escape from its obligations. He referred to the proposal by the Government of Sweden to rename the instrument "Humanitarian Standards <u>applicable in all situations</u>". Such a title would better reflect the notion that the standards would actually raise the level of protection in violent conflicts rather than the opposite, which the use of the word "minimum" would imply. However, the key question

remained: was there a need for a new declaration? Was not the problem confronting the world a political problem rather than a legal one?

48. He reminded the participants that human rights law was also to be respected in situations of armed conflict, be they international or internal. In relation to humanitarian law, he found the situation in Guatemala an interesting case of illustration. There, both parties involved in the armed conflict had agreed on the enforcement of some provisions of the Geneva Conventions and of Additional Protocol II, although by definition the situation as such was outside the scope of application of Additional Protocol II. MINUGUA had in its reports emphasized this acceptance of the parties. El Salvador was another situation where the applicability of rules and principles of international humanitiarian law had been recognized. Furthermore, in the case of Nicaragua versus the United States of America about military and paramilitary activity, the International Court of Justice had recognized the customary character of international humanitarian law. Such an approach aimed at the recognition of the absolute character of international humanitarian law principles and to ensure that they are respected in all circumstances.

49. Another important question related to the responsibility of non-governmental entities, a complex issue. Mr. Dieng pointed to the ongoing efforts by some Governments to achieve agreement within the international community on a condemnation of "gross violations of human rights" committed by terrorist groups. With reference to the struggle by the African National Congress in the past, the speaker pointed to the difficulty in some situations on agreeing on who was a "terrorist" and who a "freedom fighter".

50. In the opinion of Mr. Dieng, the first priority should be further promoting the existing norms and providing legal and technical assistance to Governments, but also to opposition groups. In the African context, the OAU should receive assistance with a view to establishing an African Court of Human Rights and to strengthening the OAU mechanism on conflict prevention.

51. Mr. Dieng suggested that the issue of minimum humanitarian standards should continue to be researched. Governments and NGOs from all regions should submit their comments so that in a few years' time an authoritative opinion could be expressed as to which road to take.

52. In addition to the prepared and scheduled addresses, Mrs. Rachel Brett of the Friends World Committee for Consultation (Quakers), Geneva, orally introduced a written contribution to the Workshop. The contribution stressed the need to avoid setting new standards that fell short of existing ones. It specified the problems under discussion as falling into the following categories:

(a) A Government will not formally recognize that an armed conflict exists, and the correct legal regime cannot therefore be applied to the situation;

(b) The derogation provisions and non-derogable rights under the human rights treaties are inadequately formulated; and

(c) The factual position is questionable and none of the existing legal regimes fit neatly.

53. The contribution stressed that it was essential that Governments should not be able to deny or contest the applicability of international humanitarian law to situations to which it clearly applied based on the facts. A Government which derogated from its obligations under a human rights treaty because of a public emergency threatening the life of the nation should not be able to deny the applicability of at least article 3 of the Geneva Conventions.

III. GENERAL DEBATE ON THE ISSUES

54. The Rapporteur summarized several comments and suggestions made during the discussion as follows:

(a) It was necessary to explore in depth some issues one at a time, gradually building up knowledge, to examine all situations and to dialogue with all actors;

(b) A meeting of the treaty bodies should be held to study the issue of minimum humanitarian standards;

(c) The Workshop should develop guidelines rather than draft text at this stage;

(d) It was necessary to move away from the notion of "minimum" in the development of standards, and to continue research on the issues involved;

(e) Relevant norms of international humanitarian law and human rights law which are recognized as part of international customary law should be identified;

(f) There was support for the ongoing ICRC study on norms of international humanitarian law which are recognized as part of international customary law;

(g) The human rights bodies should be strengthened;

(h) An analytical report on the concept of minimum humanitarian standards applicable in all circumstances was needed;

(i) Universal ratification of relevant international instruments and acceptance of individual complaints were called for, as was universal ratification of Additional Protocol II to the 1949 Geneva Conventions;

(j) The applicability of article 3 common to the Geneva Conventions and of Additional Protocol II should not be denied when a state of emergency has been declared.

55. The Rapporteur indicated that the organizers of the Workshop were of the opinion that it would be useful to obtain, at the 1997 session of the Commission on Human Rights, a decision or resolution by which the

Secretary-General would be requested to undertake an analytical study of the issues involved, including those raised at the Cape Town Workshop.

A. Issue 1 (Characteristics of the situation) and Issue 2 (The actors)

56. In order for the focus to be on the victims, it was argued that all situations must be covered by any new document. There was, therefore, no need to specify what these situations were; this would in any case be an impossible task if a new document really were to cover all potential situations. It was also argued that the drafters of the Turku Declaration implicitly had in mind certain conflict situations; they wished to fill lacunae or deficiencies in the protective systems but they also wished to avoid defining situations.

57. Others argued that any new rules should only address situations not covered by other regulations. It was questioned whether the work would be concentrated on the lowest common denominator, or whether the debate was about "the way the law is" or about "how it ought to be". A distinction had to be made between what was desirable and what was possible.

58. It was argued that rules in this regard must be understandable by the general public, and that the wording of the Martens clause might need to be illustrated and clarified by wording along the lines of the Turku Declaration. The Martens clause itself would give little guidance to the public at large.

59. In the light of the choice concerning the characterization of situations, the Turku Declaration would need redrafting.

60. One participant expressed the opinion that the object should be establishing minimum safeguards in a state of emergency; any new rule must avoid unintended consequences such as allowing scrutiny of prison conditions where a state of emergency had been declared whereas prison conditions could not be scrutinized where a state of emergency had not been declared, even if they were known to have become worse.

61. As regards coverage, it was pointed out that all conventions constituted "minimum" commitments, but if this word were to be deleted from the phrase "minimum humanitarian standards", some other specification or phrasing would be needed, such as "guidelines for" or "recommendations concerning". It was stressed that States which had not ratified any international instrument had obligations under international customary law.

62. It was questioned who would decide and at what stage a situation warranted international attention.

B. Issue 5 (Implications of a new basic document)

63. The implications of a new basic document setting out, reaffirming or developing protective regimes were discussed.

64. It was mentioned that in international circumstances inaction could sometimes occur and be tolerated where in similar national situations inaction would be unacceptable. One example of international inaction that would be

unacceptable on a national level was United Nations troops not being mandated to intervene in atrocities even if they were committed in front of their eyes; another was the possible "slow trigger" mechanism for a prosecutor system under the planned International Criminal Court.

65. It was argued that a document on minimum humanitarian standards would create a powerful tool for use, inter alia, by grass-roots organizations as it would give jus cogens and the Martens clause a meaning which would be understandable to the public at large, young and old alike. A document or declaration of some kind would have an important promotional value and international humanitarian organizations could benefit greatly from common rules/standards.

66. On the other hand, it was questioned whether a document on minimum humanitarian standards could become a tool for fostering understanding of human rights or whether it would become a tool for criticizing certain countries. The Charter of the United Nations contained important provisions governing the conduct between States as well as between States and the United Nations, for instance in Article 2, which any new document must bear in mind. However, this line of thinking was questioned by others, as the focus of attention of a document on humanitarian standards was the individual, not the State. It was also argued that the rights of individuals and the duties of States had been stressed while the duties of the individual had been given less attention.

67. It was hoped that a document on minimum humanitarian standards would not have any negative effect on adherence to Additional Protocol II and the application of article 3 common to the Geneva Conventions.

68. Several participants discussed the effect of minimum standards and their implementation on other international norms: Would they be abused because they existed in parallel with other international rules? Would they become a hindrance to other efforts to establish international norms? Would they provoke a chain reaction of calls for similar standards in fields other than the humanitarian field? How could a monitoring mechanism be implemented?

69. In response to the fear expressed by one participant, it was pointed out, and examples were given from the experience of the OSCE, that a declaration would not necessarily be a step towards a treaty, but it would help interpret international obligations. One participant questioned the need to reaffirm what had already been codified if the declaration were not to go beyond existing obligations.

70. It was stressed that the discussion had shown that there was a need for an analytical study of all the issues involved, the implications of a new document and the choice between "soft law" or "hard law" solutions to the problems acknowledged.

C. Relaunching the debate

71. Prof. Göran Melander, Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, relaunched the debate at

the beginning of the second day of the Workshop. He commented on the debate of the first day and on the issues facing the Workshop the second day.

72. As regards Issue 3 (Lacunae or deficiencies in the legal regimes of protection), he argued that there were victims of abuse in almost every armed conflict, be it civil war or internal disturbance. It could be that such abuses were contrary to international customary law, but this uncertainty would sometimes make it difficult to implement international customary law. Accordingly, lacunae and deficiencies had to be discussed against the background of existing treaties in the field.

73. Within human rights law, lacunae existed concerning rules relating to the administration of justice. He referred to articles 9 and 14 of the International Covenant on Civil and Political Rights, which contained derogable rights, i.e. a State party was entitled to derogate from those rights in time of public emergency, although the fundamental guarantees as prescribed both in article 75 of Additional Protocol I and article 4 of Additional Protocol II were applicable. Besides, the articles on fundamental guarantees were not as far-reaching as articles 9 and 14. Of course, this lacunae could be filled by the adoption of an additional protocol to the Covenant making articles 9 and 14 non-derogable. Such a solution was, however, not in sight.

74. More important lacunae and deficiencies existed, however, within humanitarian law treaties. Regarding the question of how to qualify an armed conflict, Prof. Melander argued that an authoritative ruling was needed which parties to the armed conflict would be legally obliged to respect. One possibility was for the United Nations Security Council, acting under Chapter VII, to undertake to qualify any armed conflict.

75. However, even when common article 3 and Additional Protocol I were applicable, several lacunae still existed, viz.:

(a) Inadequate protection of the civilian population;

(b) Unclear rules concerning the use of certain weapons in non-international armed conflicts, although such weapons were outlawed in international armed conflicts;

(c) Insufficient rules relating to persons hors de combat;

(d) Inadequate provisions relating to humanitarian assistance;

(e) No protection extended to internally displaced persons; and

(f) No universal treaty applicable with respect to refugees from an armed conflict.

76. As regards Issue 4 (Reference base and yardstick), Prof. Melander made reference to the so-called Martens clause. Without any doubt, that clause was of importance. However, to the general public the immediate meaning and consequence of the clause was unclear, because it has been drafted in such a general way.

77. Prof. Melander drew a parallel with provisions of human rights which were mentioned in a general way in the Charter of the United Nations and which in 1948 had been given a more precise content by the adoption of the Universal Declaration of Human Rights. He argued for the adoption of a similar document relating to humanitarian law, a "Universal Declaration of Humanitarian Law" or of "Minimum Humanitarian Standards", which would have the advantage of being a simple document which could be used for educational purposes; in the same way that human rights must be known to the public in order to be applied and respected, humanitarian law must be known to be applied and respected.

78. As regards Issue 6 (Risk of lowering standards), Prof. Melander referred to the existence of "minimum" rules in other areas as, for instance, the Standard Minimum Rules for the Treatment of Prisoners. The adoption of such rules had not led to the lowering of any standards and in many States prisoners were accorded treatment far above the minimum standard. Treaties within the field of human rights could be seen as "minimum standards" but that had not prevented States from granting individuals more favourable treatment. He doubted that "soft law" would have a negative influence on "hard law" provisions.

D. Issue 3 (Lacunae or deficiencies), Issue 4 (Need for a common reference base and yardstick) and Issue 6 (Avoiding setting standards falling short of existing obligations)

79. It was stressed that people coming from areas where State structures were collapsing had the greatest need of protection. Therefore, any new document should confirm grounds for asylum, as flight was the only form of protection in such cases. Experience showed the need for convergence between the two forms of law. Discussion of a "grey zone" would not go very far; rather, one should look at the "common stock" of human rights law and international humanitarian law. This "common stock" would reaffirm the principle of humanity.

80. One delegation referred to the limits on the proclamation of a state of emergency contained in the International Covenant on Civil and Political Rights, and the comments by the Human Rights Committee concerning derogations from articles 9 and 14 of the Covenant. "The law must be known" by the general public, by the young and the old, by the civilians as well as by the military. Perhaps it would be an incentive for States to ratify international instruments if the States knew that opposing actors in a conflict would also be bound by the same rules.

81. Another participant reiterated the view that there existed lacunae in cases of a state of emergency, thereby contradicting a previous speaker who had argued that protection of human rights in situations of internal disturbance were fully covered.

82. One delegate referred to the three elements of the Martens clause, namely established custom, principles of humanity, dictates of public conscience, and asked where one could find codified the most basic of the basic rules applicable to all persons. He characterized the present exercise as a "distillation of existing law".

83. Another participant warned against exaggerating the scope of derogation, and also warned against including non-governmental groups. Such applicability might indirectly serve as an incentive for the creation of new groups. This delegate saw some merit in ambiguity of terminology. As regards derogation, "soft law" could progressively affect "hard law". In this context, a succession of reservations and objections to the reservations made it difficult to identify core obligations.

84. Some participants were concerned about the possibility of clarifying obligations to non-governmental groups, and argued in favour of texts applicable to all persons in all situations. It was argued that the development of rules applicable in all situations might be achieved by developing the Martens clause. On the other hand, it was argued that one must not look only at part of the problem and ignore the root causes of suffering: conflicts, arms transfer problems and denial of the right to development.

85. One participant illustrated the question of intentional or non-intentional lacunae in the protective regimes by recalling that in 1972 a couple of dozen of articles were deleted from the draft Additional Protocol II during the last days of negotiation in order to make the text acceptable. The conclusion was that one would be better off with simple texts that could be understood by all. Another participant noted that existing lacunae might well be intentional, but that circumstances might have changed.

86. The lack of precision and the ambiguities in the Martens clause could be overcome in the same way as courts had to take into account ambiguities in national laws. In general terms, a legal problem was presented by those entities which were not States Members of the United Nations.

87. In this context, one participant stressed that the focus should be on awareness-building rather than on legalistic definitions. Lacunae and ambiguities could be delicacies for lawyers, but the example of the Document of the Copenhagen Meeting on the Human Dimension of the CSCE certainly illustrated that the distinction between "soft law" and "hard law" was considerably overstated.

88. Another participant stressed that overwhelming evidence from contemporary conflicts had shown that there was a lacuna in protection. For the victims it was not very interesting to dwell on whether this lacuna was a shortcoming of the rules or not. The development of a tool that could be of relevance and help to the victims was necessary. In this context, several speakers declared their preference for possible new rules that would apply to "all situations of internal violence not covered by international humanitarian law" rather than to "all situations". It was stressed that most wars were preceded by human rights violations on a massive scale, and a possible new document would be more effective if it were clear in its objectives.

89. In this context, it was stressed that less attention should be focused on distinctions between human rights law and international humanitarian law, as in practice these two forms of law were closely related and interactive. When considering the options of "soft" or "hard" law, it must be remembered that the development of "hard law" was extremely time-consuming. Further

study of "gaps" was needed. Killings of civilians in armed conflicts were taken as "natural", not as a violation of international humanitarian law.

90. In this discussion, one participant recalled that States acted on the basis of their interests, and that this fact must be borne in mind when trying to develop rules in a new document. Whatever was produced must be accepted by States. The only way was to draft provisions that would apply in "all situations not covered by international humanitarian law or national law".

91. It was argued that "soft law" had more impact in countries with a well-developed civil society. However, "soft law" provisions could have important effects on any country as was shown by the "1503 procedure" of the Commission on Human Rights which was based on the Universal Declaration and not on a treaty. One participant stressed that the "1503 procedure" operated on the basis of mutual agreement.

92. One participant felt that the debate shifted towards seeing a new document as an educational tool. In such a case, the best road might be to establish a governmental task force to develop a handbook. National laws could achieve things international law could not, which was illustrated when, in the Chiapas conflict, national law based on common article 3 was sufficient to enable the ICRC to begin operations within seven days.

E. Renewed focus on Issue 4

93. The need for a common yardstick "applicable in all situations" was stressed, but it was uncertain how to ensure that non-State actors would feel bound by such provisions. One participant recalled that all non-governmental groups wished some recognition and could therefore be encouraged to follow universal rules. Others warned against directly or indirectly giving undue recognition to non-governmental armed groups. It was stressed that abuses were committed not only by Governments, and rebels/guerrillas should also be held accountable. This fact was now receiving more attention. In this context it was recalled that the Special Rapporteur on El Salvador in one of his reports had devoted a chapter to the non-State actors.

94. It was stressed that the Turku Declaration in article 17 explicitly addressed the problem of non-recognition of non-State actors. It was further stressed that rights also entailed responsibilities. One specific problem of enforcement applied in cases where a State could not exercise control over its territory.

F. Issue 7 (Conclusions for the future)

95. See part IV, Conclusions, below.

IV. CONCLUSIONS

96. At the Workshop, which was held in the form of a free discussion, the participants agreed on the urgent need to protect those who were exposed to extreme suffering resulting from a lack of sufficient protection. However,

the participants did not attempt to define the method to be used: whether in the form of "hard law" or "soft law" provisions or whether in the form of a declaration similar to the Turku Declaration.

A. Outcome of the Workshop

97. At the concluding session of the Workshop, which incorporated the general debate on Issue 7, the participants adopted as the outcome of the Workshop the following text:

"Outcome of the Workshop

"1. The United Nations Commission on Human Rights should request the United Nations Secretary-General to undertake, in coordination with the International Committee of the Red Cross, an analytical study of the issues addressed at the Cape Town Workshop on Minimum Humanitarian Standards. Governments, treaty bodies, international organizations, particularly UNHCR, as well as all regional organizations and non-governmental organizations should be invited to contribute to the study as appropriate.

"2. The analytical study should be guided by the urgent need to protect those who are exposed to extreme suffering resulting from lack of sufficient protection. The study should, in the light of the prevailing experience during recent years, look into all the issues discussed at the Cape Town Workshop, including from the perspective of the various actors, assess the need for a United Nations document setting out and promoting minimum humanitarian standards or standards of humanity applicable in all circumstances, and consider the options for making use of the study within the United Nations system including, for example, at an open-ended seminar under the aegis of the Commission on Human Rights.

"3. The Cape Town Workshop encourages Governments, international and regional organizations as well as non-governmental organizations and civil society to promote a debate on the need for and use of minimum humanitarian standards or standards of humanity applicable in all circumstances as well as on practical measures aimed at the improvement of the situation of those affected."

B. Ideas advanced during the Workshop

98. At the concluding session it was agreed to record in the report a certain number of ideas advanced during the Workshop on how to improve the situation of those exposed to extreme suffering owing to the lack of sufficient protection. These ideas included the following:

1. The transfer of weapons, weapons technology and weapons expertise should be constrained in cases where it can be suspected that the recipient may make use thereof in contravention of international humanitarian law.

2. States parties to Additional Protocol I should make use of the procedure provided for in article 90 to refer questions of compliance with international humanitarian law to the International Fact-Finding Commission established under that provision.

3. All States Members of the United Nations must support the rapid establishment of an effective International Criminal Court (including supporting provisions for an independent prosecutor).

4. Parties to an armed conflict should be in contact with each other to clarify the international rules applicable in the given situation.

5. Warring parties should be encouraged to agree on at least a minimum of decent behaviour.

6. Conflicting parties should be encouraged to undertake joint monitoring of specific issues to hinder agents provocateurs from alleging that one or the other side is in breach of commitments it has undertaken.

Appendix 1

Programme (summary)

Friday, 27 September (09.00-13.30 - Open to media)

09.00 Opening ceremony

- Formal opening by Dr. A.M. Omar, MP, South African Minister of Justice
- Keynote address: Dr. B. Pityana, Chairman of the South African Human Rights Commission
- Dr. Asbjørn Eide, Director of the Norwegian Institute of Human Rights: Minimum Humanitarian Standards - The General Approach

11.00 Introductory speakers

- Dr. Yves Sandoz, Director of International Law and Policy, International Committee of the Red Cross (ICRC): Minimum Humanitarian Standards and International Humanitarian Law
- Prof. Zdzislav Kedzia, Representative of the High Commissioner for Human Rights: Minimum Humanitarian Standards and Human Rights
- Dr. Francis Deng, Representative of the United Nations Secretary-General on internally displaced persons: Minimum Humanitarian Standards and Internally Displaced Persons
- Mr. Adama Dieng, Secretary-General of the International Commission of Jurists (ICJ): Minimum Humanitarian Standards - The Concept

14.30 Summing up by the Rapporteur and consideration of issues to be discussed in the general debate

14.45 General debate

Saturday, 28 September

09.00 Relaunching of the debate - contribution by Prof. Göran Melander, Director of the Raoul Wallenberg Institute

General debate

14.00 Address by Justice A. Chaskalson, President of the South African Constitutional Court

15.00 General debate

Sunday, 29 September

09.00	General debate
11.00	Concluding session
12.30	Press Conference by the Co-Chairpersons, Justice Richard J. Goldstone and Prof. M.R.K. Rwelamira, and the Rapporteur, Ambassador Nils Eliasson

Appendix 2

TEXT OF THE MARTENS CLAUSE AND ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949

The so called "Martens clause" is included in the preambular part of the Hague Convention No. IV of 18 October 1907 concerning the Laws and Customs of War on Land. It is also included as article 1, paragraph 2 in Protocol I Additional to the 1949 Geneva Conventions with the following wording:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

Article 3 common to the 1949 Geneva Conventions has the following wording:

> "Article 3
>
> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> > "1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> >
> > "To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> >
> > "(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> >
> > "(b) Taking of hostages;
> >
> > "(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
> >
> > "(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> >
> > "2. The wounded and sick shall be collected and cared for.

"An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

"The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

"The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."